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IN THE

SUPREME COURT OF THE UNITED STATES

No. 446

STAPLING MACHINES CO.,

Appellant,

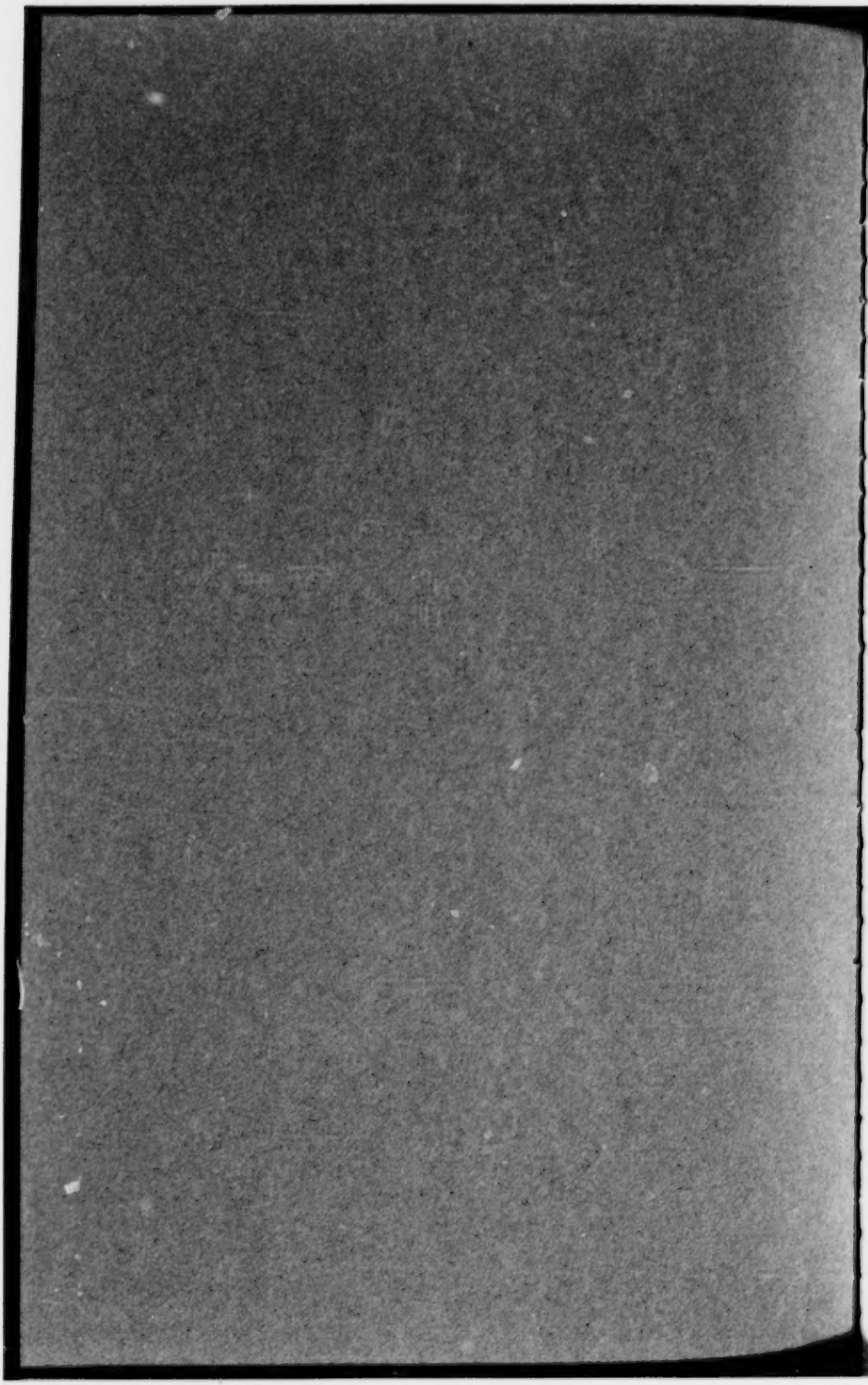
vs.

A. H. STONE, Chairman, State Tax Commission of the State of Mississippi, and J. E. STONE, General Counsel for the State Tax Commission of the State of Mississippi.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

STATEMENT AS TO JURISDICTION

BERNARD LEONARD TIGHE, JR.
Counsel for Appellant



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IN THE

SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 39,218

A. H. STONE, CHAIRMAN
STATE TAX COMMISSION

vs.

STAPLING MACHINES CO.

STATEMENT AS TO JURISDICTION

In compliance with Rule 13 of the Rules of the Supreme Court of the United States as amended, plaintiff-appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Mississippi entered in this cause.

A. The above judgment is reported in the Advance Sheets of 73 Southern, Second, No. 1, page 123, and has not been reported in the State Reports up to the present time.

B. (1) The questions involved in this case and presented to the Court for its decision are as to whether or not the Income Tax Act of the State of Mississippi, as provided in the Code of 1942, Section 9220-31, as amended by Mississippi Laws of 1944, Chapter 124, Section 1, Appendix C, violates Paragraph 3, Section 8, of the Constitution of the United States providing that Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian tribes; and as to whether or not such

Code sections violate Section (1) of the 14th Amendment to the Constitution of the United States providing that no state shall deprive any person of life, liberty, and property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

The Supreme Court of Mississippi held that the foregoing statutes were valid, permitting the State of Mississippi to impose an income tax against the income from intangibles of a foreign corporation not present in Mississippi for any purpose, and that they did not violate either the Commerce Clause or the 14th Amendment to the Constitution of the United States. The Federal question in this case was properly, timely and fully raised by Stapling Machines Co., and squarely passed upon by the Mississippi Supreme Court.

The Appellant in its defense by charge to the Supreme Court of the State of Mississippi, through its brief and arguments, contended these main points:

Point No. 1: That said income is royalty paid for the use of patented machines, the patents on which are located in the State of New Jersey, and that the situs of the patents follow the domicile of the owner under the doctrine of mobilia sequuntur personam.

Point No. 2: Appellee is not "engaging" or "continuing" within this state in the business of renting or leasing of tangible personal property. The licensing of the machines to the Mississippi licensee is wholly interstate commerce, and the taxing act herein is inapplicable because it violates the commerce clause of the United States Constitution.

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Point No. 3: If any part of appellee's income from these machines is rental, then only that part which can be said to be the fair rental value should be taxed.

Point 9: The State of Mississippi grants Appellee nothing, as the right to license its patents and enter into interstate contracts stems from the Federal Constitution and the Commerce Clause which guarantees it freedom from interference or burden by the State.

Point 10: A statute of a state which undertakes the tax on property wholly beyond her jurisdiction or control conflicts with the Fourteenth Amendment to the Constitution of the United States.

JURISDICTION

B. (2) The judgment was entered against the Appellant in the Supreme Court of the State of Mississippi on June 14, 1954; the Appellant, as provided under the Rules of the Mississippi Supreme Court, filed a Suggestion of Error June 25, 1954, and which Suggestion of Error was over-ruled by that Court on July 23, 1954, which was the final judgment of that Court, and from which no further hearing could be had. Notice of Appeal was filed on September 14, 1954, with the Clerk of the Supreme Court of the State of Mississippi.

B. (3) Chapter 28, U. S. C. 1257 (2) is the statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review this appeal.

B. (4) The following decisions are sufficient to sustain the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal in this case:

Nippert v. City of Richmond, 327 U. S. 416, 90 L. Ed. 760;

Davis v. Virginia, 236 U. S. 697, 59 L. Ed., 795;
Caldwell vs. State of North Carolina, 187 U. S. 622, 47 L. Ed. 336;
Dozier v. State of Alabama, 218 U. S. 124, 54 L. Ed. 965;
Craig v. Mills, 33 So. 2d 801, 203 Miss. 692;
Crutcher v. Kentucky (1891), 141 U. S. 47, 35 L. Ed. 649;
Webber v. Virginia (1880), 103 U. S. 344, 26 L. Ed. 565;
Robbins v. Tax District of Shelby County (Tenn.), 120 U. S. 489, 30 L. Ed. 964;
William G. Asher v. State of Texas, 128 U. S. 129, 32 L. Ed. 368;
Memphis Steam Laundry Cleaners, Inc. v. A. H. Stone, Chairman State Tax Commission, S. Ct. 96, L. Ed. 437;
Michigan-Wisconsin Pipe Line Co. v. Calvert, U. S. 98 L. Ed. Advance Page 342;
Miller Bros. Co. vs. Maryland, U. S. 98, L. Ed. Advance Page 470;
Railway Express Agency Inc. v. Virginia, U. S. 98, L. Ed. Advance Page 482.

THE PRECISE QUESTIONS INVOLVED

B. (5) The statute of the State of Mississippi being questioned as to its validity consists of the Code of 1942, Section 9220-31, as amended by Mississippi Laws of 1944, Chapter 124, Section 1. (See Appendix C).

C. (1) The State of Mississippi has violated the Commerce Clause of the Constitution of the United States, (Paragraph 3, Section 8), in attempting to tax income from intangible personal property of a non-resident, undomesticated, foreign corporation not present in the state doing business, with no officers, employees, agents, or

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representatives present in the State of Mississippi, which income is wholly in Interstate Commerce, as per stipulation between Appellant and Appellee. (R-42). (Appendix E).

The State of Mississippi has violated Section 1 of the 14th Amendment to the Constitution of the United States, by attempting to tax the income from intangibles of a foreign corporation, the situs of which is located in another state, not present in Mississippi for any purpose, having no offices, officers, employees, agents, or other representatives within the state.

The State of Mississippi has assumed extra-territorial jurisdiction in imposing an income tax under the provisions of the Mississippi Code of 1942, Section 9222, as amended by Mississippi Laws of 1944, Chapter 124, Section 1, against an undomesticated foreign corporation not present in Mississippi for any purpose, and owners of valuable patent rights from which royalties or income from intangibles are earned, without such patents having a commercial or any other domicile in the State of Mississippi. The Appellant is a Delaware corporation, located in New Jersey, where all of its license agreements are made and where all the patents are located, as per stipulation between Appellant and Appellee. (R-42). (Appendix E)

The State Income Tax Statute above referred to is unconstitutional in that it attempts to tax royalty or income from intangible personal property of a foreign corporation over which it has no jurisdiction, which is not in Mississippi by consent of the state, nor organized under its laws, that the income from the patents sought to be taxed has never been located in Mississippi, nor has the Company been present in Mississippi for any

purpose, all of the license agreements having been entered into in New Jersey.

The State of Mississippi, in order to extend its power of taxation to the Appellant's income from intangibles, has classified the royalty income from the patents owned as rental, rather than royalty, despite substantial proof in the record to the contrary, and has further classified the income as income earned by the Appellant from the use of its personal property, although the patents have never been located in Mississippi, nor have they had a business situs in Mississippi. And although the machines are present in Mississippi from which royalty income is obtained for the right to manufacture non-patented boxes, there is nothing present in Mississippi to support the royalty income from the patent grants on the right to manufacture patented boxes.

THE QUESTIONS INVOLVED ARE SUBSTANTIAL

D. (1) The facts in the case appear from the pleadings and testimony and are undisputed. (R3-102). The Appellant's petition alleged that it was a foreign corporation, organized under the laws of the State of Delaware, but whose domicile and principal place of business and all offices and officers are located in Rockaway, New Jersey, and that it was engaged in licensing patented machines and patents covering different types of boxes made by said machines, and which patents are made the subject of the license agreements with licensees in the State of Mississippi. That it has no offices, officers, agents, employees, representatives, and no place of business located in the State of Mississippi. That all license agreements are executed in the State of New Jersey where patent machines are delivered to the licensee f.o.b. Rockaway, New Jersey, after having been reimbursed

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the entire cost of the machine. That the Appellant's out-of-State agents had access to the machines, only for the purpose of sketching, to determine the need for patent changes.

The State Tax Commission has attempted to impose an income tax against said petitioner on the premise that all the income earned from these patents represent rentals received from personal property located within the State of Mississippi; although the State has stipulated with the Appellant to the effect that 90% of the boxes manufactured in Mississippi under the license agreements referred to above were covered by unexpired box patents, and approximately 10% of said boxes so manufactured were not covered by patents, said patents having expired prior to 1950, although the machines used in said manufacture were covered by unexpired machine patents. (R-44). The State Tax Commission contends that the Company's operation, although not present in Mississippi with their patents, is sufficient to be liable for the income tax imposed by the Code of 1942, Section 9220-31, as amended by Mississippi Laws of 1944, Chapter 124, Section 1, (Appendix C).

The Appellant filed with the State Tax Commission a comprehensive statement of the nature and scope of its business in Mississippi, including a stipulation and agreement, (R-42), and alleged that the imposition of the tax violates constitutional immunities in that the State had no jurisdiction to tax the income from the intangible patent rights as they had no business or commercial situs within the state; and that the State's statutory definition of "doing business" could not confer such jurisdiction; that its activities while wholly and completely in Interstate Commerce, were conducted entirely from without the State and therefore not subject

to income taxation by the State. The Commission disagreed with Appellant and entered an order sustaining the tax liability. (R-23).

The Chancery Court reversed the Tax Commission and held the Appellant not liable for the taxes on the ground, as stated in the opinion, that "the special assessment as made by the Commission in its order of February, 1953, is not supported by the law and the facts, and that the State of Mississippi does not have jurisdiction to make such assessment in this case." (R-104). (Appendix B).

OPINION BELOW

The Supreme Court of Mississippi reversed the Chancery Court and entered a final judgment on July 23, 1954, dismissing Appellant's suit and the relief prayed for the year 1950.

The Supreme Court of Mississippi summarized in its opinion:

> "The pertinent facts applicable to appellee-taxpayer are substantially the same as those outlined in the opinion in 71 So. 2d 205, and they will not be recited in detail here. The income tax here involved is broader: It taxes the net income from 'rentals or royalties from property or any interest in property within the State.'
>
> "Appellee is a Delaware corporation with its principal offices in New Jersey. It leased under a written contract to certain persons in Mississippi certain box-making machines on which it held United States patents. The lessees by this instrument obtained the right to use the patented machines to make boxes, and the right to make patented boxes. Appellee retained title to the machines, and agreed to furnish repair parts, and its agents were granted access to the ma-

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chines. The Mississippi lessees agreed to pay for the use of the machines a sum equal to four percent of the gross sales from patented boxes made under the agreement, and a sum equal to two percent of the gross sales of all other boxes not patented and made under the agreement. In addition, the Mississippi lessees had to pay as an initial consideration for the lease the cost of productio.. of the machines . . .

"Under this arrangement, the Stapling Machines Co. in the year 1950 derived gross income from rents and royalties from Mississippi in the amount of $634,209.78. Applying the ratio between Mississippi gross income and the total gross receipts in the nation, to the total net income of appellee, the State Tax Commission allocated to appellee a 1950 net income from this State in the amount of $265,972.32. Appellee had previously reported taxable net income from Mississippi for 1950 of $23,317.50. This was based upon the allocation by appellee of 1950 income only from what it considered to be rent on the machines in Mississippi, and on that return it paid a 1950 state income tax of $182.92.

"The petition for appeal charged that taxpayer had never qualified to do business in Mississippi, that it had no offices or agents in the State, and was not doing business within the State; that most, if not all, of the money received by taxpayer from Mississippi lessees for 1950 was royalty for the right to make and sell patented boxes; and that such royalty is not derived from property in Mississippi and is not subject to a state income tax. *The petition did not attack the method of allocation of net income to Mississippi, but attacked the State's power and jurisdiction to tax any of the money received by taxpayer from the Mississippi*

lessees, other than certain minimum, asserted rental values of the machines located in this State. (Underscoring ours). On the hearing in the Chancery Court, much of the same testimony and exhibits in the sales tax case were introduced into the record. On August 22, 1953, the Chancery Court entered a decree vacating and setting aside the deficiency assessment of the Commission in its order of February 6, 1953. Apparently the trial court's decree was based upon the idea that this State did not have jurisdiction to make the assessment, and on the assumptions that appellee was not doing business in Mississippi, that money received by appellee from Mississippi lessees of its machines was royalty, and that income from royalty on machines located in this State is immune from state income tax.

"Appellee contends again that it is not engaged in doing business within Mississippi, but that issue was properly decided against it in the sales tax case. Appellee further says that the licensing of the machines to the Mississippi lessees is wholly Interstate Commerce, and that to impose the state income tax on the money paid for the leases is violative of the interstate commerce clause. However, in the sales tax case we held that the machines had obtained a business situs in the state apart from the domicile of their owner, and that they had become localized and divorced from the stream of interstate commerce. (71 So. 2d 209-210). Appellee also argues that if any part of its income from these machines is rental, then only that part which can be said to be the fair rental value should be taxed. It then refers to the same testimony which was used in the record in the sales tax case, in which a real estate man and an accountant testified as to what they thought was a fair rental value of the machines used

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in Mississippi by lessees. That contention also was rejected in the sales tax case. It was there held that the *rental* which the sales tax statute made the basis of computation of that tax was two percent of gross income from patented and from unpatented boxes.

"The most substantial part of appellee's net income assessed by the Commission is derived from rent received by appellee for the use of the machines in this state, as was held in the sales tax case, 71 So. 2d 205, 207. Some of the assessed income constitutes income from royalties derived from the use in Mississippi of the patented machines. As to the latter, appellee apparently contends that the assessment is invalid because its patents are immune from taxation by any State other than that of the domicile of the taxpayer. This is beside the point. The income tax in question is not a tax on appellee's patents. It is a tax on income earned in Mississippi by the use in this state by appellee of its personal property."

The Court further stated that it was immaterial whether the income was royalty income from an intangible right, or rental income from the leasing of personal property, and that the State had jurisdiction to tax the income of the appellant, no matter what the circumstances of its earnings, whether the income was 10% rent and 90% royalty. Undoubtedly appellant is engaging in Mississippi wholly in interstate commerce to the extent that its patents are licensed from the State of New Jersey only, and for Mississippi to attempt to reach this income by taxation violates Section 1 of the 14th Amendment to the Constitution of the United States.

Briefly the Supreme Court of Mississippi held that Appellant must pay an income tax on the income from the intangible patent rights which are owned and located

in the State of New Jersey and are made the subject of a license agreement in its office in New Jersey where the machines are delivered to the licensee.

The State is taxing not only that part which may be designated as rent but that part which has been stipulated to be royalty amounting to 90% of the Company's income, which income is royalty on patent rights for the manufacture of patented boxes.

That the Federal questions are substantial in this case cannot be doubted for the reason that it represents an attempt by the State to tax for the first time royalty income from patent rights, the situs of which is located outside of the taxing state, and the ruling of the Supreme Court of the State of Mississippi is to the effect that the State of Mississippi, Appellee in this case, has the right to tax royalty income from an intangible patent right, no matter where the patent may be located.

The authority cited by the Supreme Court of the State of Mississippi as being controlling, *Fox Film Corporation vs. Doyle*, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed 1010 (1932) has no relation to the problem before this Court, as the Appellant in this cause is not asserting an immunity to this taxation because the patents are instrumentalities of the Federal Government, but rather because they are not present in Mississippi, and therefore, not subject to its jurisdiction.

In *Curry v. McCanless*, 307 U. S. 357, 83 L. Ed. 1339, the Court held that intangible income was subject to jurisdiction and taxation by two states for the reason that the evidence of ownership was located in the second state and that the ownership rights were being exercised within the jurisdiction of the second state, and, therefore, its ownership was amenable to the State laws and

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subject to State taxation; but here the evidence of ownership is not present in Mississippi and not subject to its jurisdiction.

Appellant has found no authority permitting taxation of this income by the State of Mississippi. In *Stapling Machines Co. vs. Stone*, Docket No. 106, in which this Court on October 14, 1954, handed down a Per Curiam decision, the Court will determine that the State of Mississippi made no attempt to tax royalty income as it was excluded from the measure at the time the assessment was made.

It is respectfully submitted that the questions presented by your appellant are substantial and of public importance; that the judgment rendered by the Supreme Court of Mississippi appealed from should be reversed.

BERNARD LEONARD TIGHE, JR.
Counsel for Appellant

I, John E. Stone, Attorney for the State Tax Commission, Appellee in the above entitled cause, acknowledge receipt of copy of the above and foregoing Statement of Jurisdiction.

Attorney for State Tax Commission, Appellee

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 39,218

A. H. STONE, Chairman, State Tax Commission

vs.

STAPLING MACHINES COMPANY

ARRINGTON, *Justice*:

This case involves the validity of an assessment for Mississippi income tax against a foreign corporation doing business within the State. In *Stone v. Stapling Machines Co.*, 71 S. 2d 205 (Miss. 1954), this Court upheld the validity of an assessment of a Mississippi sales tax against the same taxpayer. The tax there involved was measured by two percent of the gross receipts from "renting or leasing of tangible personal property." The pertinent facts applicable to appellee-taxpayer are substantially the same as those outlined in the opinion in 71 So. 2d 205, and they will not be recited in detail here. The income tax here involved is broader: It taxes the net income from "rentals or royalties from property or any interest in property within the State."

Appellee is a Delaware corporation with its principal offices in New Jersey. It leased under a written contract to certain persons in Mississippi certain box-making machines on which it held United States patents. The lessees by this instrument obtained the right to use the patented machines to make boxes, and the right to make patented boxes. Appellee retained title to the machines, and agreed to furnish repair parts, and its agents were granted access to the machines. The Mississippi lessees agreed to pay for the use of the machines a sum equal

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to four percent of the gross sales from patented boxes made under the agreement, and a sum equal to two percent of the gross sales of all other boxes not patented and made under the agreement. In addition, the Mississippi lessees had to pay as an initial consideration for the lease the cost of production of the machines.

Under this arrangement, the Stapling Machines Company in the year 1950 derived gross income from rents and royalties from Mississippi in the amount of $634,-209.78. Applying the ratio between Mississippi gross income and the total gross receipts in the nation, to the total net income of appellee, the State Tax Commission allocated to appellee a 1950 net income from this State in the amount of $265,972.32. Appellee had previously reported taxable net income from Mississippi for 1950 of $23,317.50. This was based upon the allocation by appellee of 1950 income only from what it considered to be rent on the machines in Mississippi, and on that return it paid a 1950 state income tax of $182.92.

Thereafter the State Tax Commission held hearings concerning appellee's 1950 taxable income, and on February 6, 1953, entered an order, as outlined above, allocating to appellee a Mississippi net income in the sum of $265,-972.32. The Commission's order, therefore, entered a deficiency assessment of income tax against appellee for the year 1950 of $15,165.42.

From that assessment order of February 6, 1953, Stapling Machines Company appealed to the Chancery Court of the First Judicial District of Hinds County. The petition for appeal charged that taxpayer had never qualified to do business in Mississippi, that it had no offices or agents in the State, and was not doing business within the State; that most, if not all, of the money re-

ceived by taxpayer from Mississippi lessees for 1950 was royalty for the right to make and sell patented boxes; and that such royalty is not derived from property in Mississippi and is not subject to a state income tax. The petition did not attack the method of allocation of net income to Mississippi, but attacked the State's power and jurisdiction to tax any of the money received by taxpayer from the Mississippi lessees, other than certain minimum, asserted rental values of the machines located in this State. On the hearing in the chancery court, much of the same testimony and exhibits in the sales tax case were introduced into the record. On August 22, 1953, the chancery court entered a decree vacating and setting aside the deficiency assessment of the Commission in its order of February 6, 1953. Apparently the trial court's decree was based upon the idea that this State did not have jurisdiction to make the assessment, and on the assumptions that appellee was not doing business in Mississippi, that money received by appellee from Mississippi lessees of its machines was royalty, and that income from royalty on machines located in this State is immune from state income tax.

However, subsequent to the date of that decree and in the sales tax case involving the same taxpayer, 71 So. 2d 205, this Court held: (1) Stapling Machines Company is doing business in Mississippi and subject to state taxation; (2) the box-making machines are located in this State, have obtained a business situs here apart from the domicile of their owner, Stapling Machines Company, have become localized within Mississippi, and are not in the stream of interstate commerce. Hence the Court in the sales tax case affirmed the Commission's allocation of gross income arising from "renting or leasing of tangible personal property", and affirmed the Commission's

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assessment of the sales tax. The sales tax decision in 71 So. 2d 205 decided substantially all of the issues in this case, except one.

Appellee contends again that it is not engaged in doing business within Mississippi, but that issue was properly decided against it in the sales tax case. Appellee further says that the licensing of the machines to the Mississippi lessees is wholly interstate commerce, and that to impose the state income tax on the money paid for the leases is violative of the interstate commerce clause. However, in the sales tax case we held that the machines had obtained a business situs in the State apart from the domicile of their owner, and that they had become localized and divorced from the stream of interstate commerce. 71 So. 2d 209-210. Appellee also argues that if any part of its income from these machines is rental, then only that part which can be said to be the fair rental value should be taxed. It then refers to the same testimony which was used in the record in the sales tax case, in which a real estate man and an accountant testified as to what they thought was a fair rental value of the machines used in Mississippi by lessees. That contention also was rejected in the sales tax case. It was there held that the *rental* which the sales tax statute made the basis of computation of that tax was two percent of gross income from patented and from unpatented boxes.

Appellee argues finally that part of the net income upon which the Commission's assessment is based is derived from royalties paid by Mississippi lessees for the use in this State of patented machines; that the patents have their situs in the State of New Jersey, since their situs follows the domicile of the owners, New Jersey. It is stated that the royalties are not paid to it for the use of any property owned by appellee in Mississippi.

The income tax statute is not limited to income from rentals. Referring to the statutes in effect in 1950, Code of 1942, Section 9222, as amended by Mississippi Laws 1944, Chapter 124, Section 1, levies a State income tax upon the entire net income "from all property owned and from every business, trade or occupation, carried on in this state by individuals, corporations, partnerships, trusts or estates, not residents of the state of Mississippi." Code Section 9231 describes items which shall be treated as income: "(1) In the case of foreign corporations or of a nonresident or citizen of a foreign country the following items of gross income shall be treated as income from sources within the State.

"(a) . . . . rentals or royalties from property or any interest in property within the State; . . . "

Hence it will be noted that the statute levies a tax upon the entire net income from all property owned or business carried on in the State by nonresident corporations, and that the statute expressly provides that "*rentals or royalties* from property or any interest in property within the State" shall be treated as income from sources within the State. This statute is clear and unambiguous, and manifestly applies to the 1950 net income allocated to Mississippi by the order of the State Tax Commission.

The most substantial part of appellee's net income assessed by the Commission is derived from rent received by appellee for the use of the machines in this state, as was held in the sales tax case, 71 So. 2d 205, 207. Some of the assessed income constitutes income from royalties derived from the use in Mississippi of the patented machines. As to the latter, appellee apparently contends that the assessment is invalid because its pat-

ents are immune from taxation by any State other than that of the domicile of the taxpayer. This is beside the point. The income tax in question is not a tax on appellee's patents. It is a tax on income earned in Mississippi by the use in this State by appellee of its personal property.

51 Am. Jur., Taxation, Section 248, says: "Over a long period of time the rule prevailed in Federal and state courts that a state had no power to tax patent rights or copyrights since such rights were created for Federal purposes under the Constitution and laws of the United States. A copyright or patent was regarded as a franchise granted by the United States, and, as such, not subject to state taxation on property. However, the view that coyprights are immune from state taxation upon the principle that they are Federal instrumentalities was dispelled when a case arose under a state statute imposing a direct charge upon gross receipts from royalties. *Fox Film Corp. v. Doyal*, 286 U. S. 123, 131, 76 L. Ed 1010, 1016, 52 S Ct 546, definitely overruling *Long v. Rockwood*, 277 U. S. 142, 72 L ed 824, 48 S Ct 463. The United States Supreme Court now takes the view that the mere fact that a copyright is property derived from a grant by the United States is insufficient to support a claim of exemption from state taxation . . . A copyright is held in private ownership and exercised for private advantage. The advantage to the public is gained merely from the carrying out of the general policy in making such grants, and not from any direct interest which the government has in the use of the property which is the subject of the grant. Therefore, although in the nature of a franchise granted by the government, it is not exercised in behalf of the government, and a tax upon the gains derived from the operations permitted by the

copyright statute is not a tax upon the exertion of any governmental function."

51 Am. Jur., Taxation, Section 797, pages 716-717, states the rule with reference to state income taxation where the income is received from royalties on patents or copyrights:

"Although at one time there was authority to support the conclusion that a state property or income tax on corporations could not be imposed without deduction or allowance for patents or copyrights held by the taxpayers, or the income or receipts therefrom, this principle is seemingly of little significance now in view of the present position of the Federal Supreme Court that copyrights are not immune from state taxation because they are granted by the Federal government. *Fox Film Corp v. Doyal*, 286 U. S. 123, 76 L ed 1010, 52 S Ct 546. Moreover, it has always been recognized that state franchise or excise taxes measured by capital stock or income may be imposed on corporations without deduction on account of patents or copyrights held by the taxpayer, ... and that the fact that an article within the jurisdiction of the state, owned by a corporation, is the product of a patented combination or process does not withdraw it from state taxation." See also 84 C. J. S., Taxation, Sec. 210, pp. 404-405.

2 Walker on Patents (Deller's ed. 1937), Section 236 says: "A state may tax as income royalties received by one of her citizens for the use of patents issued to him by the United States." It can not be disputed at this date that the income derived from royalties based upon patents is subject to both Federal and state income taxation. Ibid., and 1953 Supplement, Section 236; *Boderick v. Neale*, 201 F. 2d 621 (CCA 10th 1953).

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The leading case dealing with this question is *Fox Film Corp. v. Doyal*, 286 U. S. 123, 52 S. Ct. 546, 76 L. Ed. 1010 (1932). Fox Film Corporation was a New York corporation engaged in the State of Georgia in the business of licensing copyrighted motion pictures. The State of Georgia assessed a tax for the privilege of engaging in that business in Georgia, measured by the gross receipts from royalties. The tax was "a direct charge upon the royalties." The court held for the first time that a tax upon the profits derived from copyrights is not a tax upon an instrumentality of the Federal government and is not immune from state taxation; and that in this aspect royalties from copyrights were in the same position as royalties from the use of patent rights. The court overruled *Long v. Rockwood*, 277 U. S. 142, 48 S. Ct. 463, 72 L. Ed. 824 (1928), holding to the contrary. In Long the court had invalidated a state assessment of income tax on royalties derived from patents.

In *Educational Films Corp. of America v. Ward*, 282 U. S. 379, 51 S. Ct. 170, 75 L. Ed. 400 (1931), decided a year before Doyal, New York assessed against a New York corporation an annual tax for the privilege of exercising its franchise in the state, measured by that part of the corporation's net income allocated to the business carried on within the state. It was contended by the taxpayer that the tax was void insofar as it included income from royalties on copyrights, because it was a tax on a Federal instrumentality. That argument was rejected since the tax was nondiscriminatory and properly allocated. Doyal and Ward in effect overruled the earlier cases of *Maxwell v. Chemical Construction Co.*, 200 N. C. 500, 157 S. E. 606 (1931), and *Quicksafe Mfg. Co. v. Graham*, 161 Tenn. 46, 29 S. W. 2d 253 (1930), which were

based upon *Long v. Rockwood*, overruled expressly in Doyal.

In *Laabs v. Wisconsin Tax Com.*, 218 Wis. 414, 261 N. W. 404 (1935), which was decided after Doyal, the court upheld a Wisconsin tax upon the income derived by a Wisconsin resident from royalties on patents owned by the taxpayer. See also *Texas Co. v. Oklahoma Tax Com.*, 249 P. 2d 985, 989 (Okla. 1952); *Tirrell v. Johnston*, 293 U. S. 533, 55 S. Ct. 238 (1934).

In brief, a state may tax income from royalties based upon United States patents. There is no immunity on any assumed basis that it is a franchise granted by the Federal government. That was rejected in the Doyal case. Moreover, the assessment of the Mississippi income tax in the instant case is not violative of the interstate commerce clause. As was held in the sales tax case, 71 So. 2d 205, appellee is doing business in Mississippi. *State Tax Commission v. Memphis Natural Gas Co.*, 197 Miss. 583, 19 So. 2d 477 (1944), appeal dismissed, 323 U. S. 682, 65 S. Ct. 440, 89 L. Ed. 553. Moreover, the box making machines owned by appellee have obtained a business situs in this state apart from the domicile of their owner, and therefore there is no interference with interstate commerce. The income which is taxed here is derived from the royalties based upon the personal property owned by the appellee and located in Mississippi for local purposes. The tax is a tax upon appellee's income earned in the state. The mere fact that part of that income is derived from royalties on patents owned by appellee does not deprive Mississippi of jurisdiction to tax the income earned in Mississippi. The royalty income as well as the rental income of appellee allocated to this state are concededly derived from a source located within this state,

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the use by Mississippi lessees of the machines owned by appellee.

Appellee insists that we must apply the doctrine of mobilia sequuntur personam, and that the only taxable situs of the patents which it owns is in its domicile, New Jersey. However, there is now "no necessary constitutional objection to the taxation of intangible interests by different states," provided the taxpayer has extended his activities also to the other state and has availed himself of the protection of the laws of that other state. 51 Am. Jur., Taxation, Section 467; *Stone v. Stapling Machines Co.*, 71 So. 2d 205, 209-210. Moreover, the state income tax assessed against appellee is not a tax on the patent itself as an item of property. Appellee is being taxed for income which it has derived from the use of its patented personal property in this state. See Anno., 163 A. L. R. 985; *Parke-Davis and Co. v. Atlanta*, 200 Ga. 296, 36 S. E. 2d 773, 163 A. L. R. 976. The statute expressly provides that "rentals or royalties from property or any interest in property within the state" shall be treated as income from sources within the state. This is the same principle applied by the Federal income tax law. Anno., 167 A. L. R. 943, 974, states: "But in Sec. 119(a)(4) of the Internal Revenue Code of the United States, 26 USCA 1945 ed Sec. 119(a)(4), 6 FCA title 26, Sec. 119(a)(4), income consisting of royalties for the use of a patent or copyright is expressly declared to have its source at the place where the patent or copyright is used, rather than at the domocil of the holder of the patent or copyright. See the annotation in 160 ALR 579."

Appellee can rely only upon *Commonwealth ex rel Luckett, Com'r. of Revenue v. Radio Corporation of America*, 299 Ky. 44, 184 S. W. 2d 250 (1944). Although of doubtful validity, that case is clearly distinguishable

from the instant one. There the nonresident taxpayer was not doing business in Kentucky, and had no tangible personal property located in Kentucky from which the income was derived. This distinction was made by the Kentucky Court in *Tenn. Gas & Transmission Co. v. Commonwealth*, 308 Ky. 571, 215 S. W. 2d 102, 105 (1948).

In brief, we hold that income from royalties based upon and derived from personal property situated and localized in Mississippi, and earned and accrued here, is subject to the state income tax. The tax assessed is not a tax upon the patent rights of appellee, but upon the privilege exercised by appellee of placing its property and doing business in this state, and earning the assessed income here. The judgment of the chancery court is therefore reversed and a judgment will be entered here for appellant, reinstating and affirming the assessment order of the State Tax Commission.

REVERSED AND JUDGMENT HERE, REINSTATING AND AFFIRMING ASSESSMENT ORDER OF STATE TAX COMMISSION.

ROBERDS, P. J., and LEE, HOLMES AND ETHRIDGE, JJ., CONCUR.

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APPENDIX B

OPINION OF THE CHANCERY COURT

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 45,977

STAPLING MACHINES Co., Petitioner

vs.

A. H. STONE, CHAIRMAN, STATE TAX COMMISSION, Respondent

FINAL DECREE

Came on to be heard this cause upon the Petition of Stapling Machines Co. and the Answer of the Respondent, A. H. Stone, Chairman of the State Tax Commission, wherein Petitioner prayed that a decree be entered herein vacating and cancelling an order of the Mississippi State Tax Commission against Petitioner for additional income taxes for the year 1950 in the amount of $15,165.42, and the Court having considered the testimony and evidence offered herein does find that the special assessment as made by the Commission in its order of February 6, 1953 is not supported by the law and the facts, and that the State of Mississippi does not have jurisdiction to make such assessment in this case, said cause having been taken under advisement at the June 1953 term of Court for decision in vacation, and that Petitioner is entitled to the relief prayed for.

THEREFORE, BE IT, AND IT IS HEREBY ORDERED, ADJUDGED AND DECREED That the order establishing an additional assessment against the Stapling Machines Co. for additional income taxes in the

amount of $15,165.42, which order of said Tax Commission was dated February 6, 1953, is hereby vacated and cancelled and held for naught, and the sureties on Petitioner's bond are hereby fully and finally discharged.

ORDERED, ADJUDGED AND DECREED this the 22nd day of August, 1953.

/s/ L. Arnold Pyle
Chancellor

Filed Aug. 22, 1953

FRANK T. SCOTT, Chancery Clerk
By /s/ Jewell Burton, D. C.

APPENDIX C

THE LAW

MISSISSIPPI CODE 1942 ANNOTATED, Sec. 9220-12. Net income of nonresident and foreign taxpayers.—(1) In the case of foreign corporations or of a nonresident or citizen of a foreign country, the following items of gross income shall be treated as income from sources within the state:

(a) Interest on bonds, notes or other interest-bearing obligations, and the amount received as dividends if the evidence of ownership has acquired a business situs in this state, compensation for personal service or labor performed within the state; rentals or royalties from property or any interest in property within the state; and income from the operation, or ownership of any property within the state.

(b) From the items of gross income specified herein there shall be deducted the expenses, losses, and other deductions properly apportioned, or allocated thereto, and a ratable part of any expense, losses, or other deductions which cannot be definitely allocated to some item or class of gross income. The remainder, if any, shall be included in full as net income from sources within the state.

(c) In the case of gross income derived from sources partly within and partly without the state, the net income may first be computed by deducting the expenses, losses, or other deductions apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income; and the portion of such taxable income attributable to sources within the state may be determined by processes or formulas of general appor-

tionment, prescribed by the commissioner, with the approval of the governor.

(2) Gains, profits, and income from transportation or other services rendered partly within and partly without the state, or from the sale of personal property produced by the taxpayer within and sold without or produced by the taxpayer without and sold within the state, shall be treated as derived partly from sources within and partly from sources without the state, and such gains, profits, and the income shall be determined under such processes or formulas of general apportionment as are prescribed by the commissioner, with the approval of the governor.

(3) Gains, profits, and income derived from the purchase of personal property within and its sale without the state, or from the purchase of property without and its sale within the state, shall be treated as derived entirely from the state in which sold.

(4) A foreign corporation or a nonresident or citizen of a foreign country shall secure the benefit of the deductions and credits allowed by this act only by filing or causing to be filed with the commissioner a true and accurate return of his total income, corporate or otherwise, in the manner prescribed in this act, including therein all information which the commissioner may deem necessary for the calculation of such deductions and credits.

(5) In the case of a failure to file a return, the commissioner shall collect the tax on such income; and all property belonging to such foreign corporation, nonresident or citizen of a foreign country shall be liable for the tax. (Supersedes Sec. 9231, Code of 1942).

APPENDIX D

TRANSCRIPT OF ORDER, STATE TAX COMMISSION, JACKSON, MISSISSIPPI

Received Feb. 9, 1953

STATE OF MISSISSIPPI } ss OFFICE STATE TAX
COUNTY OF HINDS } COMMISSION
February 6, 1953

BE IT REMEMBERED THAT on the date stated above the State Tax Commission of said state adopted an order which was in words and figures as follows, to-wit:-

IN THE MATTER OF THE PETITION OF STAPLING MACHINES COMPANY OF ROCKAWAY, NEW JERSEY, FOR REVISION OF INCOME AND FRANCHISE TAXES HERETOFORE ASSESSED.

The above styled cause came on for final consideration on this the 6th day of February, 1953, pursuant to hearings held before this Commission on January 11, 1952, as shown by an order entered on page 88 of this Minute Book, and by an order of the commission on May 29, 1952, and entered on page 100 of this Minute Book, which latter order continued the matter of the income and franchise tax assessments to a future date.

It appears that, since the hearing on January 11, 1952, the Excise Commissioner, Auditors, and other employees of the Commission, have held several conferences with the representatives of Stapling Machines Company and have made an exhaustive and diligent examination of all available information and records, and the Commission is of the opinion that the action of the Commissioner in assessing additional income tax for the year 1950 in the sum of $15,165.42 should be sustained and confirmed; and

the Commission finds that this amount was determined in the following manner: That during the year 1950 the Stapling Machines Company derived gross rents and royalties from Mississippi in the amount of $634,209.78; that the company had total gross receipts during said year in the amount of $4,499,158.05; that its total net income subject to apportionment during said year was $1,886,837.05; that a portion of said total net income should be allocated to this state by applying the ratio between Mississippi royalties and rents and total gross receipts, to total net income; that said ratio between Mississippi royalties and rents, and total gross receipts is .14096188, or stated in terms of percentage, that the Mississippi royalties and rents are 14.096188% of the company's total gross receipts; that the application of said ratio to the company's total net income results in an allocation of net income to this state in the amount of $265,072.32 for said year; that the income tax liability on said net income so allocated is $15,348.34; that the company has paid a 1950 income tax to this state in the amount of $182.92 and that the company is, therefore, liable for the payment of additional 1950 income taxes in the amount of $15,165.42 and that the company is further liable for the payment of statutory interest on the additional tax due, computed at the rate of one-half of one percent per month, or part thereof, from March 15, 1951.

It is further ordered that the taxpayer shall file on this basis with respect to future income tax liabilities.

It further appearing that taxpayer is desirous of appealing from this order, as provided by law, it is further ordered that the matter of taxpayer's income tax liability for subsequent years be held on abeyance until the assessment of 1950 income taxes, herein above described, is passed upon by the Courts.

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IT IS, THEREFORE, ORDERED AND ADJUDGED That the petition of Stapling Machines Company is hereby denied and over-ruled to the extent stated by this order, and the assessment, as above stated for the year 1950 is hereby confirmed and the petitioner is hereby adjudged to be liable for the payment of additional 1950 income tax, in the sum of $15,165.42, as above stated, with interest, as above described.

It further appears that the petitioner has been assessed with sales taxes for the years 1949 and 1950, and that the validity of said sales tax assessment is now before the Courts, and that the decision of the Courts as to the validity of said sales tax assessment may aid in determining petitioner's liability for the payment of franchise taxes to this state.

It is, therefore, ordered, That the assessment of franchise taxes against petitioner for the year 1949, 1950 and 1951 be held in abeyance, pending the determination by the Courts of petitioner's sales tax liability.

It is further ordered, That the petition of Stapling Machines Company, insofar as it asks for a revision of franchise tax assessed against it, is hereby continued to a future date to be fixed by the Commission.

Ordered and adjudged this the 6th day of February, 1953.

SECRETARY'S CERTIFICATE

I, A. S. Coody, Secretary of the State Tax Commission of the State of Mississippi, do hereby certify that the above and foregoing is a true and correct copy of an order adopted by the said Commission on the date therein stated as the same appears of record in Minute Book 5

at Page 116, an official record in said office and in my official care and custody.

Witness my signature this the 6th day of February, 1953.

(Seal) /s/ A. S. Coody,
Secretary, State Tax Commission

APPENDIX E

STIPULATION AND AGREEMENT

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 45,977

STAPLING MACHINES CO. ..... *Petitioner*

vs.

A. H. STONE, CHAIRMAN
STATE TAX COMMISSION ..... *Respondent*

STIPULATION AND AGREEMENT

It is hereby stipulated and agreed by and between the attorneys for the Petitioner and Respondent that in addition to the facts set out in plaintiff's petition, which have not been denied by the answer of defendant, the following facts are true and correct:

I.

Petitioner has licensed box manufacturers in twenty-seven states under license agreements similar to the license agreement involved in this cause, and pursuant to said license agreements, has placed and does have its box-making machines in said twenty-seven states.

II.

The names and addresses of petitioner's Mississippi licensees and the dates of their respective license agreements, now in effect, are as follows:

Name	*Address*	*Date of License*
The Consumers Veneer Co. Inc.	Waynesboro, Miss.	Sept. 2, 1947
Crosby Forest Products Co.	Picayune, Miss.	Dec. 31, 1946
General Box Company of Miss.	Meridian, Miss.	Sept. 2, 1949
Great Southern Box Co., Inc.	Jackson, Miss.	Feb. 26, 1948
Indianapolis Wire Bound Box Co.	Fernwood, Miss.	Dec. 31, 1946
Rathborne, Hair & Ridgeway Box Company	Jackson, Miss.	Dec. 31, 1946
Southern Package Corp.	Hazlehurst, Miss.	Dec. 31, 1946
Wilson & Company	Natchez, Miss.	Dec. 31, 1946

Some of these licenses are substitutes for earlier licenses, none of which are now in effect.

III.

During the year 1950, 112 machines were used by the Mississippi licensees of Stapling Machines Company. The depreciated value of the machines at the beginning of the year was $430,975.00, and at the end of the year was $464,350.00. The average such value was $447,662.50. Generally such machines are of two types, namely, (1) Box Blank machines which staple wire to the box parts; and (2) Rock Fastener machines which cut the wires between box blanks and form loop fasteners on the wide ends. Substantially an equal number of each type is

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used in Mississippi and the charge for the initial right to possess each type is the same.

IV.

Petitioner's machines used in Mississippi during the year 1950 under its license agreements with the above-named licensees were brought into Mississippi during the years 1931 to 1950, inclusive, three machines having been brought into the State in 1931 and additional machines having been brought into the State every year thereafter up to and including the year 1950, eleven machines having been brought into Mississippi during the year 1950, the year involved in this cause. Four of the total of one hundred twelve machines were scrapped in 1950.

V.

In the manufacture of boxes by the above-named licensees under the license agreements now in effect the manufacture of some of the boxes entails the use of two machines, in series, whereas the manufacture of other boxes requires the use of only a single machine. Thus, Rock Fastener, All-Bound and James boxes, said boxes being equipped with loop fasteners, pass through both a Box Blank and a Rock Fastener machine. The other boxes pass through a Box Blank machine only.

VI.

During the year 1950, approximately ninety per cent of the boxes manufactured in Mississippi under the license agreements hereinabove referred to were covered by unexpired box patents, and approximately ten per cent of said boxes so manufactured were not covered by patents, said patents having expired prior to the year 1950. The machines used in said manufacture were covered by unexpired machine patents.

VII.

All payments to Stapling Machines Company from its Mississippi licensees were made in the form of checks and were received in Rockaway, New Jersey, through the United States mail.

VIII.

The company maintains a sales promotion staff, members of which visit fruit and vegetable packing houses throughout the fruit and vegetable regions, including Mississippi, to promote the use of wirebound boxes. They do not sell anything. The company also maintains a machine service staff, members of which visit the plants of petitioner's licensees to advise and instruct the mechanics of the licensee on the installation and maintenance of the machines. They do not sell anything.

It is further stipulated that the testimony of Mr. William Norton and Mr. J. H. Wells, given in the Circuit Court, Hinds County, in the case of *Stapling Machines Co. v. A. H. Stone* being Cause No. 13,056, and tried on the 17th day of November, 1952, both on direct and cross-examination, can be submitted and used in the trial of this cause in the Chancery Court of Hinds County, Mississippi, subject to the right of counsel for either party to object to the admissibility thereof.

It is further agreed that in supplementing the testimony of Mr. Norton and Mr. Wells, if they were asked the following questions, they would give the following answers subject to right of counsel for Respondent to object to the admissibility:

Q. Have you read and studied the Lease and License Agreement made an exhibit in this cause?

A. Yes.

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Q. If you, Mr. Norton, were requested as a Certified Public Accountant, and you, Mr. Wells, were requested as a realtor and appraiser, to make a report as to what portion of the 4% and 2% payments called for by the agreement is royalty, for the right to operate under machine & box patents, what would you report?

A. I would report that all such payments were royalty for the following reasons:

1. The third paragraph of Section 2 on page 2 of the lease and license agreement reads as follows:

   "Lessee hereby agrees to pay to Lessor for the initial right to possess all machines leased hereunder, delivered f.o.b. place of manufacture, a sum of money, to be specified by Lessor, not to exceed the reasonable cost of production of such machines, one-half to be paid with order, balance upon receipt of shipping notice."

   Having been paid the full cost of the machines, the Lessor has no investment in the machines upon which to base or collect a rental.

2. The 4% and 2% payments have all of the attributes of royalty and none of the attributes of rent. The 4% and 2% payments called for by the lease and license agreement are not fixed or definite as to amount or time. They vary from month to month depending upon the gross sales of boxes by the Lessee. Clearly such payments come within the definition of royalty and not within the definition of rent.

All of the foregoing, together with the allegations of the petition, admitted by the answer, should constitute the facts on which this cause may be tried.

WITNESS OUR SIGNATURES, this the 29th day of July, 1953.

/s/ B. L. Tighe
Attorney for Petitioner

/s/ Henry A. Fly
Attorney for Respondent

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